

THE BASICS OF DRUG PROSECUTION

Basic Prosecutor Course, August 2016
Steve Garside – Layton City Attorney's Office

JUSTICE REINVESTMENT INITIATIVE

BACKGROUND

IMPACT ON PROSECUTION

SCHEDULES

ELEMENTS OF UNLAWFUL POSSESSION

▪ UCA Section 58-37-8 – Prohibited acts – Penalties.

(1) Prohibited acts A – Penalties and reporting:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute;

or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct that results in any violation of any provision of Title 58, Chapters 37, Utah Controlled Substances Act, 37a, Utah Drug Paraphernalia Act, 37b, Imitation Controlled Substances Act, 37c, Utah Controlled Substance Precursor Act, or 37d, Clandestine Drug Lab Act, that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, Utah Controlled Substances Act, 37a, Utah Drug Paraphernalia Act, 37b, Imitation Controlled Substances Act, 37c, Utah Controlled Substance Precursor Act, or 37d, Clandestine Drug Lab Act, on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance or a counterfeit of a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric acid as listed in

Distribution /
Manufacturing

Criminal
Enterprise

Penalties

Schedule III is guilty of a second degree felony, punishable by imprisonment for not more than 15 years, and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance or a counterfeit of a substance classified in Schedule III or IV, or marijuana, or a substance listed in Section 58-37-4.2 is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance or a counterfeit of a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(e) The Administrative Office of the Courts shall report to the Division of Occupational and Professional Licensing the name, case number, date of conviction, and if known, the date of birth of each person convicted of violating Subsection (2)(a).

(2) Prohibited acts B – Penalties and reporting:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of the person's professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony; or

(ii) a substance classified in Schedule I or II, or a controlled substance analog, is guilty of a class A misdemeanor on a first or second conviction, and on a third or subsequent conviction is guilty of a third degree felony.

**Firearm
Enhancement**

**Simple
Possession**

**Penalty /
Enhancement**

**Enhancement
Prior
Distribution**

(c) Upon a person's conviction of a violation of this Subsection (2) subsequent to a conviction under Subsection (1)(a), that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

**Enhancement
All but
Marijuana &
Schedule I & II**

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i) or (ii), including a substance listed in Section 58-37-4.2, or marijuana, is guilty of a class B misdemeanor. Upon a third conviction the person is guilty of a class A misdemeanor, and upon a fourth or subsequent conviction the person is guilty of a third degree felony.

**Enhancement
Jail / Prison**

(e) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

**Enhancement
Property
Owner/Forged
Script**

(f) Any person convicted of violating Subsection (2)(a)(ii) or (iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (2)(h) who, in an offense not amounting to a violation of Section 76-5-207:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in the person's body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

(h) A person who violates Subsection (2)(g) by having in the person's body:

(i) a controlled substance classified under Schedule I, other than those described in Subsection (2)(h)(ii), or a controlled substance classified under Schedule II is guilty of a second degree felony;

(ii) marijuana, tetrahydrocannabinols, or equivalents described in Subsection 58-37-4(2)(a)(iii)(S) or (AA), or a substance listed in Section 58-37-4.2 is guilty of a third degree felony; or

(iii) any controlled substance classified under Schedules III, IV, or V is guilty of a class A misdemeanor.

(i) A person is guilty of a separate offense for each victim suffering serious bodily injury or death as a result of the person's negligent driving in violation of

**Each Victim
Separate**

Subsection 58-37-8(2)(g) whether or not the injuries arise from the same episode of driving.

(j) The Administrative Office of the Courts shall report to the Division of Occupational and Professional Licensing the name, case number, date of conviction, and if known, the date of birth of each person convicted of violating Subsection (2)(a).

**Prescription
Fraud**

(3) Prohibited acts C – Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent oneself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) (i) A first or second conviction under Subsection (3)(a)(i), (ii), or (iii) is a class A misdemeanor.

(ii) A third or subsequent conviction under Subsection (3)(a)(i), (ii), or (iii) is a third degree felony.

(c) A violation of Subsection (3)(a)(iv) is a third degree felony.

**Drug Free
Zones**

(4) Prohibited acts D – Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act that is unlawful under Subsection (1)(a), Section 58-37a-5, or Section 58-37b-4 is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools during the hours of 6 a.m. through 10 p.m.;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions during the hours of 6 a.m. through 10 p.m.;

(iii) in or on the grounds of a preschool or child-care facility during the preschool's or facility's hours of operation;

(iv) in a public park, amusement park, arcade, or recreation center when the public or amusement park, arcade, or recreation center is open to the public;

(v) in or on the grounds of a house of worship as defined in Section 76-10-501;

(vi) in or on the grounds of a library when the library is open to the public;

(vii) within any area that is within 100 feet of any structure, facility, or grounds included in Subsections (4)(a)(i), (ii), (iii), (iv), (v), and (vi);

(viii) in the presence of a person younger than 18 years of age, regardless of where the act occurs; or

(ix) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section 76-8-311.3.

(b) (i) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this Subsection (4) would have been a first degree felony.

(ii) Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense. This Subsection (4)(c) does not apply to a violation of Subsection (2)(g).

(d) (i) If the violation is of Subsection (4)(a)(ix):

(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(ix).

(e) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6) (a) For purposes of penalty enhancement under Subsections (1) and (2), a plea of guilty or no contest to a violation or attempted violation of this section or

a plea which is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

(b) A prior conviction used for a penalty enhancement under Subsection (2) shall be a conviction that is:

- (i) from a separate criminal episode than the current charge; and
- (ii) from a conviction that is separate from any other conviction used to enhance the current charge.

(7) A person may be charged and sentenced for a violation of this section, notwithstanding a charge and sentence for a violation of any other section of this chapter.

(8) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) In any prosecution for a violation of this chapter, evidence or proof that shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(10) This section does not prohibit a veterinarian, in good faith and in the course of the veterinarian's professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under the veterinarian's direction and supervision.

(11) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under this chapter who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of the officer's employment.

(12)(a) Civil or criminal liability may not be imposed under this section on any Indian, as defined in Subsection 58-37-2(1)(v), who uses, possesses, or transports peyote for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion as defined in Subsection 58-37-2(1)(w).

(b) In a prosecution alleging violation of this section regarding peyote as defined in Subsection 58-37-4(2)(a)(iii)(V), it is an affirmative defense that the peyote was used, possessed, or transported by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion.

(c) (i) The defendant shall provide written notice of intent to claim an affirmative defense under this Subsection (12) as soon as practicable, but not later than 10 days prior to trial.

(ii) The notice shall include the specific claims of the affirmative defense.

(iii) The court may waive the notice requirement in the interest of justice for good cause shown, if the prosecutor is not unfairly prejudiced by the lack of timely notice.

(d) The defendant shall establish the affirmative defense under this Subsection (12) by a preponderance of the evidence. If the defense is established, it is a complete defense to the charges.

Affirmative Defenses

(13)(a) It is an affirmative defense that the person produced, possessed, or administered a controlled substance listed in Section 58-37-4.2 if the person:

(i) was engaged in medical research; and

(ii) was a holder of a valid license to possess controlled substances under Section 58-37-6.

(b) It is not a defense under Subsection (13)(a) that the person prescribed or dispensed a controlled substance listed in Section 58-37-4.2.

(14) It is an affirmative defense that the person possessed, in the person's body, a controlled substance listed in Section 58-37-4.2 if:

(a) the person was the subject of medical research conducted by a holder of a valid license to possess controlled substances under Section 58-37-6; and

(b) the substance was administered to the person by the medical researcher.

(15) The application of any increase in penalty under this section to a violation of Subsection (2)(a)(i) may not result in any greater penalty than a second degree felony. This Subsection (15) takes precedence over any conflicting provision of this section.

(16)(a) It is an affirmative defense to an allegation of the commission of an offense listed in Subsection (16)(b) that the person:

(i) reasonably believes that the person or another person is experiencing an overdose event due to the ingestion, injection, inhalation, or other introduction into the human body of a controlled substance or other substance;

(ii) reports in good faith the overdose event to a medical provider, an emergency medical service provider as defined in Section 26-8a-102, a law enforcement officer, a 911 emergency call system, or an emergency dispatch system, or the person is the subject of a report made under this Subsection (16);

(iii) provides in the report under Subsection (16)(a)(ii) a functional description of the actual location of the overdose event that facilitates responding to the person experiencing the overdose event;

(iv) remains at the location of the person experiencing the overdose event until a responding law enforcement officer or emergency medical service provider arrives, or remains at the medical care facility where the person experiencing an overdose event is located until a responding law enforcement officer arrives;

(v) cooperates with the responding medical provider, emergency medical service provider, and law enforcement officer, including providing

information regarding the person experiencing the overdose event and any substances the person may have injected, inhaled, or otherwise introduced into the person's body; and

(vi) is alleged to have committed the offense in the same course of events from which the reported overdose arose.

(b) The offenses referred to in Subsection (16)(a) are:

(i) the possession or use of less than 16 ounces of marijuana;

(ii) the possession or use of a scheduled or listed controlled substance other than marijuana; and

(iii) any violation of Chapter 37a, Utah Drug Paraphernalia Act, or Chapter 37b, Imitation Controlled Substances Act.

(c) As used in this Subsection (16) and in Section 76-3-203.11, "good faith" does not include seeking medical assistance under this section during the course of a law enforcement agency's execution of a search warrant, execution of an arrest warrant, or other lawful search.

(17) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

(18) A legislative body of a political subdivision may not enact an ordinance that is less restrictive than any provision of this chapter.

(19)(a) If a minor who is under 18 years of age is found by a court to have violated this section and the violation is the minor's first violation of this section, the court may:

(i) order the minor to complete a screening as defined in Section 41-6a-501;

(ii) order the minor to complete an assessment as defined in Section 41-6a-501 if the screening indicates an assessment to be appropriate; and

(iii) order the minor to complete an educational series as defined in Section 41-6a-501 or substance abuse treatment as indicated by an assessment.

(b) If a minor who is under 18 years of age is found by a court to have violated this section and the violation is the minor's second or subsequent violation of this section, the court shall:

(i) order the minor to complete a screening as defined in Section 41-6a-501;

(ii) order the minor to complete an assessment as defined in Section 41-6a-501 if the screening indicates an assessment to be appropriate; and

(iii) order the minor to complete an educational series as defined in Section 41-6a-501 or substance abuse treatment as indicated by an assessment.

PARAPHERNALIA

- **UCA Section 58-37a-3 – "Drug paraphernalia" defined.**

As used in this chapter, "drug paraphernalia" means any equipment, product, or material used, or intended for use, to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, conceal, inject, ingest, inhale, or to otherwise introduce a controlled substance into the human body in violation of Title 58, Chapter 37, Utah Controlled Substances Act, and includes, but is not limited to:

(1) kits used, or intended for use, in planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) kits used, or intended for use, in manufacturing, compounding, converting, producing, processing, or preparing a controlled substance;

(3) isomerization devices used, or intended for use, to increase the potency of any species of plant which is a controlled substance;

(4) testing equipment used, or intended for use, to identify or to analyze the strength, effectiveness, or purity of a controlled substance;

(5) scales and balances used, or intended for use, in weighing or measuring a controlled substance;

(6) diluents and adulterants, such as quinine hydrochloride, mannitol, mannited, dextrose and lactose, used, or intended for use to cut a controlled substance;

(7) separation gins and sifters used, or intended for use to remove twigs, seeds, or other impurities from marihuana;

(8) blenders, bowls, containers, spoons and mixing devices used, or intended for use to compound a controlled substance;

(9) capsules, balloons, envelopes, and other containers used, or intended for use to package small quantities of a controlled substance;

(10) containers and other objects used, or intended for use to store or conceal a controlled substance;

(11) hypodermic syringes, needles, and other objects used, or intended for use to parenterally inject a controlled substance into the human body, except as provided in Section 58-37a-5; and

(12) objects used, or intended for use to ingest, inhale, or otherwise introduce a controlled substance into the human body, including but not limited to:

(a) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) water pipes;

(c) carburetion tubes and devices;

(d) smoking and carburetion masks;

(e) roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(f) miniature cocaine spoons and cocaine vials;

(g) chamber pipes;

(h) carburetor pipes;

(i) electric pipes;

(j) air-driven pipes;

(k) chillums;

(l) bongs; and

(m) ice pipes or chillers.

▪ **UCA Section 58-37a-4 – Considerations in determining whether object is drug paraphernalia.**

In determining whether an object is drug paraphernalia, the trier of fact, in addition to all other logically relevant factors, should consider:

(1) statements by an owner or by anyone in control of the object concerning its use;

(2) prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to a controlled substance;

(3) the proximity of the object, in time and space, to a direct violation of this chapter;

(4) the proximity of the object to a controlled substance;

(5) the existence of any residue of a controlled substance on the object;

(6) instructions whether oral or written, provided with the object concerning its use;

(7) descriptive materials accompanying the object which explain or depict its use;

(8) national and local advertising concerning its use;

(9) the manner in which the object is displayed for sale;

(10) whether the owner or anyone in control of the object is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(11) direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(12) the existence and scope of legitimate uses of the object in the community;

(13) whether the object is subject to Section 58-37a-5; and

(14) expert testimony concerning its use.

▪ **UCA Section 58-37a-5 – Unlawful acts.**

(1) (a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter.

(b) Any person who violates Subsection (1)(a) is guilty of a class B misdemeanor.

(2) (a) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, any drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body in violation of this act.

(b) Any person who violates Subsection (2)(a) is guilty of a class A misdemeanor.

(3) Any person 18 years of age or older who delivers drug paraphernalia to a person younger than 18 years of age and who is three years or more younger than the person making the delivery is guilty of a third degree felony.

(4) (a) It is unlawful for any person to place in this state in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement is to promote the sale of drug paraphernalia.

(b) Any person who violates Subsection (4)(a) is guilty of a class B misdemeanor.

(5) (a) A person may not be charged with distribution of hypodermic syringes as drug paraphernalia if at the time of sale or distribution the syringes are in a sealed sterile package and are for a legitimate medical purpose, including:

- (i) injection of prescription medications as prescribed by a practitioner; or
- (ii) the prevention of disease transmission.

(b) A person may not be charged with possession of hypodermic syringes as drug paraphernalia if the syringe is unused and is in a sealed sterile package.

(6) A person may be charged and sentenced for a violation of this section, notwithstanding a charge and sentence for a violation of any other section of this chapter.

POSSESSION

- Knowing and Intentional
- Constructive

State v Gonzalez-Camargo, 2012 UT App 366

The Utah Code provides, "It is unlawful ... for any person knowingly and intentionally to possess ... a controlled substance." Utah Code Ann. § 58-37-8(2)(a)(i) (LexisNexis 2012); see also *id.* § 58-37-4(2)(b)(iii)(B) (categorizing methamphetamine as a controlled substance). Although Gonzalez-Camargo did not have any drugs on his person when he was arrested, "[a] person who does not have actual physical possession may still be convicted ... if the State can prove constructive possession." *Workman*, 2005 UT 66, ¶ 31, 122 P.3d 639.

¶ 17 To establish constructive possession, the State must " 'prove that there was a sufficient nexus between the accused and the drug to permit an inference that the accused had both the power and the intent to exercise dominion and control over the drug.' " *Id.* (quoting *State v. Fox*, 709 P.2d 316, 319 (Utah 1985)). Whether a sufficient nexus exists " 'depends upon the facts and circumstances of each case.' " *Id.* (quoting *Fox*, 709 P.2d at 319). In determining whether a sufficient nexus exists to establish constructive possession, we consider several factors, including,

[O]wnership and/or occupancy of the residence or vehicle where the drugs were found, presence of defendant at the time drugs were found, defendant's proximity to the drugs, previous drug use, incriminating statements or behavior, presence of drugs in a specific area where the defendant had control, etc.

Id. ¶ 32; accord *Fox*, 709 P.2d at 319. This list is not exhaustive and "many of these factors, by themselves, are insufficient to establish the requisite nexus." *Id.* ¶¶ 32–33. For example, "[o]wnership and/or occupancy of the premises upon which the drugs are found, although important factors, are not alone sufficient to establish constructive possession, especially when occupancy is not exclusive." See *Fox*, 709 P.2d at 319–20 (holding that evidence that the defendant lived in a home where marijuana was being cultivated was insufficient to support a finding of constructive possession); see also *State v. Anderton*, 668 P.2d 1258, 1264 (Utah 1983) (Durham, J., concurring) (stating that a spouse's joint ownership and occupancy of a home where drugs are found is insufficient to establish constructive possession); *Spanish Fork City v. Bryan*, 1999 UT App 61, ¶¶ 2, 10–11, 975 P.2d 501 (holding that a spouse's joint occupancy of a home where drug paraphernalia was found was insufficient to establish the spouse's constructive possession). Instead, the defendant's joint occupancy of the premises where the controlled substance is discovered must be combined with other evidence sufficient to establish the defendant's knowing and intentional control over it. See *Workman*, 2005 UT 66, ¶¶ 34–35, 122 P.3d 639 (holding that the cumulative effect of the evidence was sufficient to establish that defendant constructively possessed the methamphetamine laboratory discovered in a bedroom she shared with a renter); *State v. Hansen*, 732 P.2d 127, 129, 132 (Utah 1987) (per curiam) (affirming a conviction based on constructive possession where the controlled substance was found in a locked, metal box under a pile of dirty laundry in the defendant's room, a key to the box was found in the defendant's pocket, and drug scales were found on his bookshelf). We must therefore determine whether the factors present in this case are such that a jury could have concluded beyond a reasonable doubt that there was a sufficient nexus between Gonzalez–Camargo and the methamphetamine to establish that he knowingly and intentionally possessed it.

¶ 18 Gonzalez–Camargo bases his argument that there was insufficient evidence to support his conviction on the State's inability to establish the initial location of the lockbox containing the methamphetamine, its failure to link him to the methamphetamine, and its failure to show that he had the ability and intent to exercise control over it. The State counters that the discovery of the methamphetamine in the

north bedroom that Gonzalez–Camargo shared with Girlfriend was sufficient to establish constructive possession, particularly since Gonzalez–Camargo was present at the time of the search. In support of its position, the State argues that the video of the scene reveals that the "bedroom was dominated by his possessions" and that the first agents to enter the scene found the lockbox on the floor, intermingled with his computers.

***State v Valencia*, 2015 UT App 285**

¶ 6 "Possession sufficient to sustain a conviction need not be actual but may be constructive." *State v. Cardona–Gueton*, 2012 UT App 336, ¶ 8, 291 P.3d 847 (citation and internal quotation marks omitted). "To establish constructive possession, the State must prove that there was a sufficient nexus between the accused and the drug to permit an inference that the accused had both the power and the intent to exercise dominion and control over the drug." *State v. Gonzalez–Camargo*, 2012 UT App 366, ¶ 17, 293 P.3d 1121 (citations and internal quotation marks omitted); see also Utah Code Ann. § 58–37–2(1)(ii) (LexisNexis 2012) (defining "possession"). Factors relevant to this inquiry may include, among other things, "ownership and/or occupancy of the ... vehicle where the drugs were found, presence of defendant at the time drugs were found, defendant's proximity to the drugs, previous drug use, incriminating statements or behavior, presence of drugs in a specific area where the defendant had control, etc." *State v. Workman*, 2005 UT 66, ¶ 32, 122 P.3d 639. While occupancy "may not be enough to show constructive possession by itself[,] ... additional evidence, including circumstantial evidence, that strengthens the nexus between ... occupancy and the contraband" may support "an inference of possession." *State v. Ashcraft*, 2015 UT 5, ¶ 20, 349 P.3d 664.

¶ 7 In this case, the jury heard two phone calls made from a cell phone belonging to a woman named Tiffany Booth to Craig Green, a known drug dealer whose phone was being wiretapped by the Weber Morgan Narcotics Strike Force. In the first call, a woman, presumably Booth, offered to trade a cell phone for some "D," which an officer interpreted to mean "dope or drugs." In the second call, an unidentified male asked Green if he had "three quarters of an ounce" and indicated that he had \$600. An officer testified that \$600 was "consistent with what one could pay for three quarters of an ounce for methamphetamine" and that three quarters of an ounce is considered a "dealer quantity." The jury then heard a third call, in which Green called a phone number later identified as Valencia's and arranged to meet at a gas station in Roy, Utah. The officer testified that the individual talking on Valencia's

phone "appeared to [have] the same voice or similar voice" as the unidentified male who had previously called Green from Booth's phone and that the call "was definitely a continuation of the other two calls" made by Booth and the unidentified male from Booth's phone.

¶ 8 Another officer testified that he followed Green to the gas station, where he observed Booth and Valencia pull into the parking lot next to Green's vehicle and watched Valencia make a hand-to-hand exchange with Green. Ultimately, when officers pulled over Booth and Valencia's vehicle, they discovered methamphetamine on Booth's person and a digital scale of the kind "commonly used to weigh narcotics" in the passenger-side glove compartment in front of where Valencia was sitting.

¶ 9 Although the State did not present a witness to identify Valencia's voice, the evidence indicated that one of the calls was made by Green to Valencia's phone, that the voice on that call was similar to the voice on the earlier call, and that Valencia met Green in the place agreed to in the telephone discussion. This circumstantial evidence supports a reasonable inference that Valencia *566 was the person on the phone who agreed to purchase drugs from Green. Valencia's agreement to purchase the drugs, his hand-to-hand exchange with Green, and the later discovery of the drugs in the possession of his travelling companion, taken together, create a reasonable inference that Valencia possessed the methamphetamine jointly with Booth. The inference that Valencia and Booth were jointly involved in a scheme to purchase methamphetamine in a "dealer quantity," coupled with Valencia's proximity to the digital scale, also created a reasonable inference that Valencia constructively possessed the scale. Thus, the State presented believable evidence from which the jury could have reasonably found the possession element on both charges. Because this evidence was sufficient to support Valencia's convictions, the trial court could not have granted a directed verdict on either charge and any motion defense counsel might have made would have been futile. See *State v. Heywood*, 2015 UT App 191, ¶ 48, 357 P.3d 565.

¶ 10 Valencia points to evidence contradicting the inference of possession, such as the fact that a police dog did not indicate on his person, despite Valencia's allegedly having handled the methamphetamine; that the quantity of methamphetamine found on Booth was more than the three quarters of an ounce she and Valencia had allegedly agreed to purchase; that the object in Valencia's hand both before and after the hand-to-hand exchange looked like it could be a cell phone; that officers following the vehicle did not see Valencia transfer anything to Booth; and that the State failed to explicitly identify Valencia as the person on the other end of the calls with Green. While this evidence certainly weakens the State's case, the trial court is

not free to weigh the evidence in considering a motion for directed verdict. See *State v. Montoya*, 2004 UT 5, ¶ 32, 84 P.3d 1183.

State v Lucero

19 These two facts track similar circumstances in *State v. Ashcraft*; namely, that the contraband containers in both cases were within reach of the defendants and both defendants denied ownership of the respective containers. See 2015 UT 5, 349 P.3d 664. But in *Ashcraft*, the majority expressly rejected the idea that “anyone who has the misfortune of occupying a vehicle in which illegal drugs are found is subject to conviction.” *Id.* ¶ 21 n. 5. Instead, the supreme court detailed additional facts that suggested a nexus between Ashcraft and the bag before concluding that all of the evidence combined was sufficient for a jury to find beyond a reasonable doubt that Ashcraft constructively possessed the bag. *Id.* ¶¶ 22, 27 (explaining that the pieces of evidence were “suspect” and “a slim basis” for conviction individually but that, considered cumulatively, they were sufficient to sustain a jury verdict based on constructive possession).

¶ 20 It is true that both Ashcraft and Lucero could reach the contraband containers in the vehicles they were driving. But in *Ashcraft*, the jury also heard evidence to the effect that a knife carried by Ashcraft was caked in a tar-like substance that matched the substance found inside the bag. *Id.* ¶¶ 21, 26. And it is true that both Ashcraft and Lucero denied owning the containers. But unlike Lucero, Ashcraft did not merely deny ownership; rather, before the contents of the bag were even revealed, Ashcraft brashly accused the searching officer of planting the bag in his truck. *Id.* ¶ 25 (noting that Ashcraft’s accusations suggested that he knew contraband would be found inside the bag). Moreover, Ashcraft was carrying an unusually large amount of cash, *id.* ¶ 21, and the police officer may have seen Ashcraft driving the truck through a drug-ridden area multiple times on two successive nights, *id.* ¶ 21. But see *supra* ¶ 16 n. 4.

¶ 21 *Ashcraft* instructs that the ability to reach a contraband container and the simple denial of ownership of that container are, in the absence of other corroborative evidence, insufficient to establish constructive possession beyond a reasonable doubt. This comports with the principle that constructive possession cannot be inferred from mere co-occupancy of the area where contraband is found. See, e.g., *Ashcraft*, 2015 UT 5, ¶ 20 & n. 3, 349 P.3d 664; *State v. Workman*, 2005 UT 66, ¶¶ 33–35, 122 P.3d 639;

State v. Fox, 709 P.2d 316, 320 (Utah 1985); *Gonzalez–Camargo*, 2012 UT App 366, ¶ 17, 293 P.3d 1121; *State v. Salas*, 820 P.2d 1386, 1388 (Utah Ct.App.1991).

¶ 22 Considered alone, Lucero's co-occupancy of the car was an insufficient basis to attribute constructive possession of the sling backpack and its contents to him. See *Workman*, 2005 UT 66, ¶ 33, 122 P.3d 639 (explaining that shared occupancy of a bedroom was insufficient to establish constructive possession). We conclude that the other two pieces of evidence presented by the State to buttress the constructive-possession theory—that the backpack was within Lucero's reach and that Lucero denied owning it—do not “constitute other evidence sufficient to establish the defendant's knowing and intentional control over [the contraband]” beyond a reasonable doubt. See *Gonzalez–Camargo*, 2012 UT App 366, ¶ 17, 293 P.3d 1121.⁶